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No. 83-781

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

TIMOTHY TILTON, Et Al. - - - Petitioners

versus

JEFFERSON COUNTY BOARD OF EDUCATION, Et Al. - - - - Respondents

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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INTRODUCTION

The Petitioners respectfully submit this reply brief in support of their Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit. This brief replies to the argument of mootness, which was first raised in the Respondents' Brief in Opposition to the petition.

SUMMARY OF ARGUMENT

This case is not moot for two reasons. First, each of the named Petitioners retains a legally cognizable interest in the outcome of this litigation. Even if the claims of the named Petitioners were moot, they must be presumed to be representatives of a properly pled class, whose members have an actual controversy with

the Respondents. Second, the importance of the issue presented mitigates against any finding of mootness.

ARGUMENT

I. THIS CASE IS NOT MOOT

Citing familiar principles of Article III limitations on judicial review, the respondents contend that this case is now moot. They have supplied affidavits reciting the current educational placement of each of the named petitioners, suggesting that these placements compel a conclusion of mootness. Careful examination of the relief sought in the children's complaint and the issues central to the merits of this case demonstrates the inadequacy of respondents' position.

A. The Case Is Not Moot as to the Named Petitioners.

Any consideration of mootness must analyze the particular facts presented as well as the nature of the relief sought. Here, Jewel Manor provided the only year-round educational program and offered these children additional unique educational features. *See* Petition for Writ of Certiorari ("Petition"), at 4. When Jewel Manor was closed, no year-round educational program was available; these children were deprived of year-round education and the other unique features of the Jewel Manor program, a deprivation they continue to suffer today. Alternative, but not comparable,

educational placement is no substitute for the programs which were lost when Jewel Manor closed.[1]

Each of the children named as a petitioner is still enrolled in the Jefferson County School system. Affidavits B, C and D, Respondents Brief, at 24-29. Should this Court grant a Writ of Certiorari and reverse the decision of the Sixth Circuit, there is no reason why Jewel Manor could not be reopened. In the alternative, the children could be placed in an educational program comparable to that provided at Jewel Manor at the time it closed. In either event, these children would receive some of the relief prayed for in their complaint, compensating them partially for harm suffered as a result of any violation of their statutory rights. Their claims are therefore not moot.

In addition to being situated such that they can obtain partial relief from the respondents' past conduct, these children have a cognizable interest in preventing repetition of this conduct. An action will not be deemed moot unless the controversy between the parties no longer exists and "there is no reasonable expectation" that it will recur in the future. *U. S.* v. *W. T. Grant Co.*, 345 U. S. 629, 633 (1953).

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[1]The petitioners' decision not to complete the administrative process does not render this case moot. *See* Respondents' Brief, at 9. This suit was filed to prevent any change in the children's placement. When the suit was summarily dismissed shortly after its filing, the parents and guardians had no reason to believe that they could obtain relief by resort to an administrative process that had been previously unresponsive when it closed Jewel Manor without any parental imput.

As detailed above, a controversy continues to exist between the parties as to the specific educational program to which the children are currently entitled. Moreover, so long as these petitioners attend school in the Jefferson County system, and so long as the Sixth Circuit's judicially created "cost exception" exists, there is every expectation that the controversy will recur.

The Sixth Circuit held that local authorities may escape the procedural requirements of 20 U.S.C. §1415 (e)(3) by asserting that a change in educational placement is due solely to financial constraints. *Tilton* v. *Jefferson County Bd. of Education,* 705 F. 2d 800 (6th Cir. 1983). Every time that these respondents allege that budgetary considerations require a change in the children's placement, either by changing program content or closing a facility, they will be free to do so without regard for the procedural requirements of §1415 (e)(3).[2]

This case is not moot where the challenged act is capable of repetition and where, as here, the petitioners have a personal stake in preventing repetition. *See, e.g., Carroll* v. *President & Commissioners,* 393 U. S. 175 (1968) (appeal from injunction against political rallies not moot although the injunction expired prior to adjudication), and *Super Tire Engineering Co.* v. *McCorkle,* 416 U. S. 115 (1974) (challenge to payment of welfare benefits to striking workers not moot although strike had ended). The continued existence of

[2]Indeed, federal law mandates that each child's educational placement be reviewed at least annually. 34 C.F.R. §300.343(d).

the cost exception to §1415(e)(3) has a direct effect on the named petitioners' current educational placement and a reasonable expectation of affecting their future educational programming. The case is therefore not moot as to them.

B. This Case Is Not Moot as to the Class Which the Children Seek to Represent.

This Court has had repeated occasion to "demonstrate the flexible character of the Art. III mootness doctrine." *United States Parole Commission* v. *Geraghty,* 445 U. S. 388, 401 (1980). The cases illustrate that "[e]ach case must be decided on its own facts." *Id.,* at 406, n. 11. The peculiar procedural history of this case aside, respondents' selective recitation of the case law concerning mootness in light of class litigation fails to provide the full picture.

Even if this Court should conclude that the claims of the named children are moot, a dismissal for mootness does not automatically follow. Undoubtedly, where a class has been certified, the extinction of the named plaintiff's claim on appeal does not render the case moot, providing there is an actual controversy "between a named defendant and a member of the class represented by the named plaintiff. . . ." *Sosna* v. *Iowa,* 419 U. S. 393, 402 (1975). Moreover, this Court has "held that an action brought on behalf of a class does not become moot upon expiration of the named plaintiff's substantive claim, even though class certification has been *denied.*" *Gergahty,* 445 U. S. at 404 (emphasis added).

Here, the District Court's order made no reference to petitioners' class allegations. Petition, at 30. The case was summarily dismissed *sua sponte* nine days after filing. No opportunity was afforded for filing a motion for certification of the class.[3] It is readily apparent, however, that the complaint contains properly pled allegations on behalf of a class and sub-class. Petition, at 36-37.

Federal courts have held that "pending certification, class status must be presumed." *Smith* v. *Josten's Am. Yearbook Co.*, 78 F.R.D. 154, 168 (D. Kans. 1968). *See also, Kahan* v. *Rosenstiel*, 424 F. 2d 161, 169 (3d Cir.) *cert. denied*, 398 U. S. 950 (1970). The instant case presents a summary dismissal that left no opportunity for a formal class certification motion and contained no findings regarding the proposed class.

This Court has noted that certain cases may exist "in which the controversy involving the named plaintiffs is such that it becomes moot as to them before the district court can reasonably be expected to rule on a certification." *Sosna*, U. S. at 403, n. 11. Here, where the District Court's action precluded pursuit of class certification, class certification should be held to "relate back" to the original claims for injunctive and declaratory relief. *See Sosna* and *Geraghty, supra.* Even if their personal claims are deemed moot, petitioners should thus be afforded the opportunity to proceed as a putative class, on behalf of the large class of students

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[3]Local rules afford ninety (90) days for filing a motion for class certification. Rule 18(b), Local Rules of the United States District Court for the Western District of Kentucky.

whose individual educational placements were unilaterally changed and who were given no opportunity to avail themselves of the procedural protections of §1415 (e)(3).

II. THE IMPORTANCE OF THIS COURT'S RULING ON THE PROCEDURAL PROTECTIONS OF THE ACT MITIGATES ANY CONSIDERATION OF MOOTNESS.

Regardless of any asserted mootness, significant issues remain concerning the propriety of a judicially created cost exception to procedures mandated by Congress and held fundamental by this Court. *Board of Education* v. *Rowley,* 458 U. S. 176, 206 (1982).

Some commentators have gone so far as to suggest a "public interest exception" to the mootness doctrine. *See, e.g.,* Diamond, *Federal Jurisdiction to Decide Moot Cases,* 94 U. Pa. L. Rev. 125, 138 (1946), and Newberg, *Class Actions,* §1099, Vol. I, at 151 n.24. While we do not contend that a "public interest exception" alone saves a case from mootness, the continued vitality of petitioners' individual and class claims are bolstered by consideration of the public importance of this case. The cost exception created by the Sixth Circuit has already been cited with approval by the Second Circuit. *Fallis* v. *Ambach,* 710 F. 2d 49 (2d Cir. 1983).

The budgetary loophole created by the Sixth Circuit flies in the face of this Court's reasoned analysis in *Rowley* and effectively guts the Act. The Act provides a clear legislative mandate that handicapped children

are not to be treated in an educationally inferior manner, even though their education may be more costly than that for a non-handicapped child. The Sixth Circuit has provided a powerful tool for financially strapped states, allowing them to circumvent the Act's requirements and effectively reducing the Act to mere verbiage. Handicapped children are the most difficult and most expensive to educate, yet the Sixth Circuit has paved the way for states to cut corners when it comes to educating the handicapped. Surely this is not what the drafters of the Act contemplated.

CONCLUSION

This Court has emphasized that "each case must be decided on its own facts," *Geraghty,* 445 U. S. at 405, n.11, and that formalistic Article III jurisprudence "is riddled with exceptions." *Id.* Petitioners do not suggest a radical departure from the Court's continued analysis of the mootness doctrine. To the contrary, the "practicalities and prudential considerations," *Geraghty, id.,* compel the conclusion that this case is not moot. For the foregoing reasons, and those contained in the Petition, a Writ of Certiorari should issue.

Respectfully submitted,

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PROOF OF SERVICE

We, Geneva Faye Parris and David Alan Friedman, counsel of record for the Petitioners, having been admitted to practice before the Supreme Court of the United States, do hereby certify that three (3) copies of this Reply Brief were mailed, first class mail, postage prepaid, to Dan C. McCubbin, Counsel for the Cross-Petitioners, 3332 Newburg Road, Louisville, Kentucky 40218, this 4 day of January, 1984.

Geneva Faye Parris

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David Alan Friedman

DAVID ALAN FRIEDMAN

APPENDIX

APPENDIX

Local Rules of the United States District Court for the Western District of Kentucky

RULE 18. CLASS ACTIONS

(a) Contents of Complaint. A complaint or other pleading asserting a class action shall contain sufficient allegations to identify the class and the claim as a class action, including but not necessarily limited to:

(1) The approximate size and definition of the alleged class;

(2) The basis upon which the party or parties maintaining the class action or other parties claimed to be representing the class are alleged to be adequate representatives of said class;

(3) The alleged questions of law and fact claimed to be common to the class.

(b) Motion for Certification. Unless the Court otherwise orders, the party asserting a class action shall within ninety (90) days after the filing of a pleading asserting the existence of a class, move for a determination under Rule 23(c)(1), Federal Rules of Civil Procedure, whether the action is maintainable as a class action and, if so, the membership of the class. If no such motion is filed, the Court may enter an order that the action is not maintainable as a class action. Nothing in this rule shall preclude a motion by any party at any time to strike the class action allegations or to dismiss the complaint.